1908
March 23.

REVISIONAL CIVIL.

Before Mr. Justice Karamat Husein.

ASMA BIBI (DEFENDANT) *v.* AHMAD HUSAIN AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 551—*Effect of dismissal of appeal—Amendment of decree—Civil Procedure Code, section* 206.

Held that the dismissal of an appeal under section 551 of the Code of Civil Procedure is a decree and supersedes the decree of the Court below. The Court, therefore, which has taken action under section 551 is the only Court which has jurisdiction to amend the decree under section 206 of the Code of Civil Procedure. *Uma Sundari Devi* v. *Bindu Bashini Chowdhrani* (1), *Peary Mohan* v. *Mohendra Nath* (2) and *Munisami Naidu* v. *Munisami Reddi* (3) followed. *Bapu* v. *Vajir* (4) dissented from. *Rudr Prasad* v. *Baijnath* (5), *Thakur of Masuda* v. *The widows of the Thakur of Nandwara* (6), *Kristnama Chariar* v. *Mangammal* (7), *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy* (8), *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (9), *Murlidhar* v. *Tapeshri Rai* (10), *Royal Reddi* v. *Linga Leddi* (11), *Thakur Takhatsangji* v. *Bai Sundrabai* (12) and *Kushal Chintaman* v. *Supdu Tapiram* (13) referred to.

The facts of the case are the following. In a suit for their shares in the property left by one Aminuddin, deceased, a plaint was presented on behalf of Asma Bibi and others against Ahmad Husain and others in the court of the Subordinate Judge of Jaunpur. The suit was contested by the defendants. The Subordinate Judge of Jaunpur returned the plaint to be presented to the Subordinate Judge of Benares, and on the 8th February 1906 a formal order was framed by the Subordinate Judge of Jaunpur which awarded full costs to Asma Bibi and others. The Judgment-debtors appealed against that order to the High Court under section 588, clause (6), of the Code of Civil Procedure. In the memorandum of appeal objection was taken to the full costs. The High Court dismissed the appeal under section 551, clause (1), of the Code of Civil Procedure on the 24th May 1906.

* Civil Revision No. 18 of 1907 from an order of Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 26th of May 1906.

(1) (1897) I. L. R., 24 Calc., 759.
(2) (1906) 4 C. L. J., 566.
(3) (1898) I. L. R., 22 Mad., 293.
(4) (1896) I. L. R., 21 Bom., 548.
(5) (1893) I. L. R., 15 All., 367.
(6) (1880) I. L. R., 2 All., 819
(7) (1902) I. L. R., 26 Mad., 91.
(8) (1872) 10 B. L. R., 101.
(9) (1888) I. L. R., 16 Calc., 250
(10) Weekly Notes, 1894, p. 46.
(11) (1881) I. L. R., 3 Mad. 1.
(12) Bombay P. J., 1891, p. 58.
(13) Bombay P. J., 1891, p. 239.

Prior to the dismissal of the appeal under section 551, the judgment-debtors had applied to the Court below for the amendment of the decree dated 8th February 1906 under section 206 of the Code as to the full costs. The Court below, after that dismissal under section 551, amended its decree on the 26th of May 1906. One of the decree-holders then applied in revision to the High Court under section 622 of the Code of Civil Procedure on the ground that the Court below had no jurisdiction to amend a decree confirmed by the High Court.

Pandit *Baldeo Ram Dave*, for the applicant.

Mr. *B. E. O'Conor* (for whom Babu *Sital Prasad Ghosh*), for the opposite parties.

KARAMAT HUSEIN, J.—The facts of the case are the following. In a suit for their shares in the property left by one Aminuddin, deceased, a plaint was presented on behalf of Asma Bibi and others against Ahmad Husain and others to the learned Subordinate Judge of Jaunpur.

The suit was contested by the defendants. The learned Subordinate Judge of Jaunpur returned the plaint to be presented to the learned Subordinate Judge of Benares, and on the 8th February 1906 a formal order was framed by the learned Subordinate Judge of Jaunpur which awarded full costs to Asma Bibi and others. The judgment-debtors appealed against that order to the High Court under section 588, clause (6), of the Code of Civil Procedure. In the memorandum of appeal objection was taken to the full costs. A Bench of this Court dismissed the appeal under section 551, clause (1), of the Code of Civil Procedure on the 24th May 1906.

Prior to the dismissal of the appeal under section 551, the judgment-debtors had applied to the Court below for the amendment of the decree, dated 8th February 1906, under section 206 of the Code as to the full costs. The Court below, after that dismissal under section 551, amended its decree on the 26th of May 1906. One of the decree-holders comes to this Court in revision under section 622 of the Code of Civil Procedure on the ground that the Court below had no jurisdiction to amend a decree confirmed by the High Court.

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The question whether the Court below in such a case has or has not jurisdiction to amend its own decree is of much practical importance, and its determination depends upon determining the nature of the dismissal of an appeal under section 551, clause (1). If the dismissal is a decree, it supersedes the decree of the Court below, and that Court has no jurisdiction to amend the decree of this Court, but if the dismissal is an *order* as distinguished from a *decree*, the decree of the Court below is the only decree in existence and that Court can amend it. The Calcutta and Madras High Courts have held that a dismissal under section 551, clause (1), is a *decree*, see *Uma Sundari Debi* v. *Bindu Bashini Chowdhrani* (1), *Peary Mohan* v. *Mohendra Nath* (2) and *Munisami Naidu* v. *Munisami Reddi* (3). The Bombay High Court in *Bapu* v. *Vajir* (4), however, ruled that the dismissal of an appeal under section 551 of the Civil Procedure Code (Act XIV of 1882) leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower Court which can amend it or bring it into accordance with its judgment.

The view is based, not upon any principle, but upon the change of language made in section 551 by section 47 of Act VII of 1888, as appears from the following remarks of the learned Judges. They say:—"The change of language made in 1888 in that section by the Legislature shows, we think, that it was intended that there should be a difference between the results of a dismissal under it and of a confirmation under section 577; as indeed we think, there must be. Dismissing an appeal is, we think, refusing to entertain it, as in the case of an appeal dismissed as being time-barred. Where an appeal is dismissed under section 551, there is no decree of the High Court which can be executed . . ."

To my mind the view taken by the Calcutta and Madras High Courts is more in keeping with the principles on which the law of procedure is based than the view of the Bombay High Court. The dismissal of an appeal under section 551, clause (1) of the Code of Civil Procedure, is a final adjudication upon the rights of the parties to the appeal and is therefore a decree within the definition of that term in the Code.

(1) (1897) I. L. R., 24 Calc., 759.
(2) (1906) 4 C. L. J., 566.
(3) (1898) I. L. R., 22 Mad., 293.
(4) (1896) I. L. R., 21 Bom., 548.

Again the admission of an appeal is a condition precedent to the exercise of the power conferred by section 551, clause (1)—See *Rudr Prasad* v. *Baijnath* (1). The hearing of the appellant or his pleader by the terms of the section is also a condition precedent to the exercise of that power; and if an appeal is dismissed after it has been admitted and heard the dismissal must result in a decree superseding that of the Court below.

A full Bench of this Court in *Thakur of Masuda* v. *the widows of the Thakur of Nandwara* (2) remarks :—" For it was, although a proceeding under section 551 and therefore *ex parte*, of such a nature that judgment upon it against the appellant finally disposed of the case on the merits." The remarks show that an appeal is disposed of under section 551 on the merits. This being the case the dismissal can be nothing but a *decree*.

Besides the appellate Court as soon as it admits an appeal is seised of it—see *Kristnama Chariar* v. *Mangammal* (3)—and the Code of Civil Procedure or any other Act has conferred no power upon such appellate Court in such a case to so refrain from deciding the appeal as to leave the decree of the Court below unsuperseded. " The function of an appellate Court," their Lordships of the Privy Council say, " is to determine what decree the Court below ought to have made. It may affirm, reverse or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given "—*Kistokinker Ghosh Roy* v. *Burrodacaunt Singh Roy* (4).

Such being the function of an appellate Court, it cannot refuse to entertain an appeal which has been admitted and in which the appellant or his pleader has been heard, nor can it in such a case leave a decree of the Court below so ' untouched ' as to give it jurisdiction to amend its own decree after the dismissal of the appeal under section 551, clause (1) of the Code. To say that the appellate Court has such a power and that it has been

(1) I. L. R., 15 All., 367; at p. 369. (3) I. L. R., 26 Mad., 91; at p. 96.
(2) I. L. R., 2 All., 819; at p. 823. (4) 10 B. L. R., 101; at p. 113.

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conferred upon it by amending section 551 and substituting "dismiss the appeal, etc.," for "confirm the decision of the Court, etc." is more than I can comprehend. To give an appellate Court the power of refusing to entertain an appeal which has been admitted and in which the appellant has been heard and of refraining from passing a decree which should supersede the decree of the Court below is opposed to the objects for which the Courts of appeal are established and cannot be inferred from a slight change made in the language of section 551.

Their Lordships in the case of *Kistokinker*, no doubt, remark that "there may be cases in which the appellate Court particularly on special appeal might see good reason to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable yet not open to examination by reason of the special appeal," and the learned Judges who decided *Venkatanarasimha Naidu* (1) with reference to those remarks say to the effect that the language of the Judicial Committee suggests a distinction between a confirmatory decree and a decree which simply dismisses the appeal. Those remarks, anyhow, cannot be construed to mean that the dismissal of an appeal under section 551, clause (1), is not a decree. The learned Judges who decided *Bapu* v. *Vajir* (2) have themselves conceded that the dismissal under section 551 is a decree. They say:—"Mr. Govardhan argues that the dismissal of the appeal under section 551 is a decree and appealable under section 584. That may be conceded; still it is clearly not confirming the decree of the lower Court." They have, however, drawn a distinction between a confirmatory decree and a decree which simply dismisses the appeal without noticing the results to which the distinction leads. In cases of dismissal under section 551, clause (1), it leads to the existence of two decrees, in one and the same case at one and the same time, *i.e.*—

(a) The decree of the Court below which according to the learned Judges is untouched.

(b) The decree of the appellate Court which simply dismisses the appeal without confirming the decree of the Court below.

(1) 10 Mad., L. J., 260. (2) (1896) I. L. R., 21 Bom., 548.

When an appeal is dismissed as time-barred, it is to be remarked, with due respect to the learned Judges, that the appellate Court in such a case does not passively refuse to entertain it. It actively determines the rights of the parties to the appeal. Such determination being an exercise of the function of the appellate Court gives a fresh starting point of limitation—see *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (1) and *Murlidhar* v. *Tapeshri Rai* (2) The learned Judges say that " where an appeal is dismissed under section 551 there is no decree of the High Court which can be executed." If they mean that no decrees as a matter of practice are framed, their reasoning with the utmost respect to the learned Judges, proves nothing. The omission to frame a formal decree cannot establish that the dismissal under section 551 is not a decree. If they mean that the dismissal is not a decree, they with due deference to them, not only beg the question but contradict themselves for they have "conceded" that the dismissal is a decree. There is nothing in the Code of Civil Procedure to prohibit the preparation of a decree when an appeal is disposed of under section 551.

A reference to the printed judgments of the Bombay High Court for 1891, pp. 58 and 239* shows that that Court, adopting

* Judgment in Appeal No. 805 of 1889 from appellate decree—*Thakur Takhatsangji* v. *Bai Sundrabai*.

The District Judge in this case has merely dismissed the appeal from the decree of the Subordinate Judge without giving any reasons for such dismissal. The Madras High Court has held that there should be a judgment and decree in cases dealt with under section 551 as well as in cases dealt with under the latter sections of the Code—see *Royal Reddi* v. *Linga Reddi* (I. L. R., 3 Mad., 1). This view has been adopted by this Court, and a general rule has been issued accordingly for the guidance of the subordinate Courts. We must therefore reverse the decree of the Court below and remand this case for a fresh decree to be passed according to law.

[Printed judgments of the Bombay High Court, 1891, p. 58.]

Judgment in Appeal No. 469 of 1890—*Khushal Chintaman* v. *Supdu Tapiram*.

The acting Judge, Mr. Mascardi, after calling for the record and hearing the appellant's pleader, dismissed the appeal under section 551. The very brief judgment recorded states that the plaintiff had not proved the genuineness of his sale-deed. It is contended here that as no reasons are given for this finding the learned Judge has not complied with the requirements of law. We are of opinion that he ought to have observed the rules made by this Court (printed at p. 27 of the Circular Orders) and thus have given a judgment at greater length and with more discussion of reasons. Cf. *Thakur Takhatsangji* v. *Bai Sundrabai* (P. J. for 1891, p. 58).

[Printed judgments of the Bombay High Court, 1891, p. 239.]

(1) (1888) I. L. R., 16 Calc., 250. (2) Weekly Notes, 1894, p. 46.

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the view of the Madras High Court in *Royal Reddi* v. *Linga Reddi* (1) that there should be a judgment and decree in cases dealt with under section 551, issued a general rule to that effect for the guidance of the subordinate Courts. I, however, presume that these judgments and the general rule as to the framing of decrees in cases dealt with under section 551 were not brought to the notice of the learned Judges who decided *Bapu* v. *Vajir*. Had those judgments and the general rule been brought to their notice they might have arrived at a different conclusion.

For the above reasons I am of opinion that the dismissal of an appeal under section 551, clause (1), is a decree; that it supersedes the decree of the Court below, and that in the case before me the High Court is the only Court which has jurisdiction to amend the decree under section 206 of the Code of Civil Procedure.

I therefore allow the application for revision and set aside the order of the learned Subordinate Judge of Jaunpur amending the decree, dated the 8th February 1906 as to the full costs. I make no order as to costs.

Application allowed.

(1) (1881) I. L. R., 3 Mad., 1.